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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1938.

Nos. ~~817 and 818.~~ 23-24

IN THE MATTER OF
LOS ANGELES LUMBER PRODUCTS COMPANY, LTD.,
a corporation,

Debtor.

THOMAS K. CASE AND ADELE B. COWAN,

Petitioners,

vs.

LOS ANGELES LUMBER PRODUCTS COMPANY, LTD.,
a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FARIES AND MCDOWELL,
DAVID R. FARIES,
Subway Terminal Bldg., Los Angeles, Cal.,
J. CLIFFORD ARGUE,
Of Counsel.

GIBSON, DUNN AND CRUTCHER,
J. C. MACFARLAND,
STUART L. LAPP,
WOODWARD M. TAYLOR,
Banks-Huntley Bldg., Los Angeles, Cal.,
Attorneys for Respondent.

FREDERIC H. STURDY,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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IN THE

SUPREME COURT

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OCTOBER TERM, 1938.

Nos. 817 and 818.

IN THE MATTER OF

LOS ANGELES LUMBER PRODUCTS COMPANY, LTD., a corporation,

Debtor.

THOMAS K. CASE AND ADELE B. COWAN,

Petitioners,

vs.

LOS ANGELES LUMBER PRODUCTS COMPANY, LTD., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Statement of Case.

Petitioners herein seek a writ of certiorari to review the decision [R. pp. 372-380] of the United States Circuit Court of Appeals, for the Ninth Circuit, made on January 12, 1939, in the above mentioned cause, said decision being reported in Volume 100 Fed. (2d) at page 963. Said decision of the said Circuit Court was rendered

on appeals from the interlocutory order [R. pp. 129-155] and final order [R. pp. 306-364] made by the Honorable Ralph E. Jenney, Judge of the District Court of the United States, Southern District of California, Central Division, In the Matter of Los Angeles Lumber Products Company, Ltd., debtor, confirming the plan of reorganization [R. pp. 18-41] and modifications thereto [R. pp. 58-62] (herein referred to as the "plan") proposed by Los Angeles Lumber Products Company, Ltd. (sometimes referred to in the petition and in petitioners' brief as debtor or debtor corporation, but hereinafter referred to as "respondent") in the above mentioned proceeding filed under and pursuant to the provisions of Section 77B of the National Bankruptcy Act. The decision of the District Court and its opinion in connection therewith is reported in Volume 24 Fed. Supp. at page 501.

The two appeals above mentioned were consolidated by stipulation of counsel and order of the Circuit Court [R. pp. 365-368]. A complete and concise statement of the facts of this case is to be found in Appendix I to this brief, in the opinions of the District Court [R. pp. 202 to 245] and of the Circuit Court [R. pp. 372 to 380] and also in the report of the Special Master [R. pp. 63 to 118]. So as not to unduly lengthen this brief, we refer to said Appendix and said portions of the record for a statement of facts and incorporate the same herein by reference if this Court deems the consideration of the facts of the case essential to a determination of the question of whether a writ should or should not be granted. In answering petitioners' arguments respondent has, in certain instances, referred to the facts of the case at bar, but we have not undertaken to point out or correct all of the inaccuracies or omissions in factual statements made by petitioners.

SUMMARY OF ARGUMENT AS REQUESTED BY PARAGRAPH 2(f) OF RULE 27.

I.

Grounds for Denial of Petition.

Respondent submits that the petition herein should be denied for the following reasons:

1. The petition does not contain (a) a summary and short statement of the matter involved, or (b) a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question, or (c) the questions presented, or (d) the reasons relied on for the allowance of the writ. The supporting brief annexed to the petition is neither direct nor concise.

2. If it granted the writ, this Court could reach no different decision than the Circuit Court, due to the absence of a complete record and the stipulation of the petitioners not to question the findings of the District Court.

3. None of the reasons as outlined in paragraph 5(b) of Rule 38 of this Court has been or can properly be urged as a ground for the granting of the writ in this case.

II.

Respondent's Answers to Petitioners' Arguments.

Petitioners' arguments, in the main, go to the conclusions reached by the District Court on the merits of the case, as to substantially all of which the Circuit Court ruled that it was bound by the judgment of the District Court. As to the remaining points the Circuit Court affirmed the District Court's decision. Accordingly, petitioners' arguments are not appropriate in this proceeding;

nevertheless, respondent has briefly answered all the main contentions of petitioners herein and a brief summary thereof is as follows:

As to Points I, V and VI (which go to the merits and attack the findings and conclusions of the District Court), if it granted the writ, this Court could reach no different decision than the Circuit Court, due to the absence of a complete record and the stipulation of the petitioners not to question the findings of the District Court.

As to Point II, the question of respondent's solvency is immaterial, since the present shareholders' participation in the reorganization is based upon the fact that they are contributing a new, additional, and valuable consideration to the reorganized company, the value of which the District Court found exceeded the value of the new stock being issued to the present shareholders of respondent under the plan.

As to Point III, the provisions of Subdivision (b)(5) of Section 77B have no relevancy to the case at bar, since the holders of more than two-thirds in amount of the bonds in this case consented to the plan.

As to Point IV, petitioners' premise is wrong, for they fail to take cognizance of the fact that bankruptcy has intervened, that the plan has been found fair, equitable, feasible and not discriminatory by the District Court and that the holders of more than two-thirds in amount of the bonds in this case have consented thereto.

As to Point VII, to hold respondent estopped by the quoted provision of the trust indenture would be to enforce a contract not to take advantage of the provisions of the bankruptcy law, which contract would be unenforceable. This provision of the indenture was, and could properly be, disregarded by the District Court under the provisions of Subdivision (b)(10) of Section 77B.

I.

Grounds for Denial of Petition.

1. PETITION HEREIN SHOULD BE DENIED FOR THE REASON THAT IT DOES NOT CONTAIN (A) A SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED, OR (B) A STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OR DECREE IN QUESTION, OR (C) THE QUESTIONS PRESENTED, OR (D) THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT. THE SUPPORTING BRIEF ANNEXED TO THE PETITION IS NEITHER DIRECT NOR CONCISE.

Respondent's position stated in the summary is either well taken and should be accepted by this Court, or rejected. It does not need extended argument.

The rules of this Court on the subject of certiorari have been clear and explicit for many years, and the revisions adopted February 13, 1939, which became effective February 27, 1939, are even more explicit. Rule 38 provides, in paragraph 2 thereof, that a failure to comply with the requirements of the rule will be a sufficient reason for denying the petition. In paragraph 5 of Rule 38 this Court has stated very clearly that a review on a writ of certiorari is not a matter of right, but a matter for sound judicial discretion and will be granted only where there are special and important reasons therefor, and the rule points out certain types of reasons which will be considered by the Court. The failure of petitioners, in their sixteen-page petition, to advance any sound reasons for the granting of the writ and particularly any reasons of the character outlined in Rule 38, paragraph 5, is pointed out later in this brief.

Petitioners' brief is neither direct nor concise. It is approximately sixty pages in length and is a co-mixture of an argument with respect to the merits of the plan of reorganization and the decisions of the District and Circuit Courts with respect thereto, the facts which were presented to and considered by the District Court, and certain propositions of law, which petitioners refer to repeatedly as "questions of substantive law". Respondent submits that all questions of law in this case were correctly decided by the District Court and the Circuit Court, and that no review is necessary or possible in the state of the record.

2. If it Granted the Writ, This Court Could Reach No Different Decision Than the Circuit Court, Due to the Absence of a Complete Record and the Stipulation of the Petitioners Not to Question the Findings of the District Court.

This Court will note that petitioners were before the Circuit Court on the judgment roll and with only a partial transcript of the record in the case. Respondent did not insist upon a complete record because of a stipulation between counsel for petitioners and respondent, by the terms of which, among other things, petitioners agreed that on their appeal to the Circuit Court they would raise questions of substantive law only and that they would not question the regularity of any procedure had in the District Court and would not attack any finding of the Dis-

trict Court on the ground that it was unsupported by the evidence [R. pp. 285-287].

The Circuit Court, in its decision [R. pp. 372-380], held that, because of the state of the record and in the light of said stipulation, it was not possible for it to do other than accept and affirm the orders of the District Court. It is submitted by respondent that if this Court granted the writ of certiorari and reviewed the said decision of the Circuit Court, it could reach no other or different decision than was reached by said Circuit Court. The District Court made certain findings of fact upon which it based certain conclusions of law which were in accord with the clear and undisputed provisions of Section 77B. The Circuit Court upheld the District Court in the conclusions of law which were reached by the District Court. The Circuit Court also held that, due to the condition of the record on appeal and the stipulation between petitioners and respondent, the Circuit Court could not go behind the findings of fact made by the District Court and weigh the evidence upon which the District Court based said findings. As pointed out above, if this Court undertook to review this case, it would find itself in no different position than the Circuit Court found itself. Respondent respectfully submits that this conclusion can be reached by this Court by a mere reading of said stipulation [R. pp. 285-287] and the opinion of the Circuit Court [R. pp. 372-380].

3. NONE OF THE REASONS AS OUTLINED IN PARAGRAPH 5(B) OF RULE 38 OF THIS COURT HAS BEEN OR CAN PROPERLY BE ARGUED AS A GROUND FOR THE GRANTING OF THE WRIT IN THIS CASE.

Respondent has called to the attention of this Court, under paragraph 1 above, that Petitioners have failed to give any reasons upon which they relied for the allowance of the writ. The Circuit Court has not rendered a decision in conflict with the decision of any other Circuit Court of Appeals on the same matter. It has not decided an important question of local law in conflict with applicable local decisions. It has not decided a federal question in a way probably in conflict with applicable decisions of this Court, nor has it so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

It therefore remains, under this point, for respondent to briefly discuss the question of whether the Circuit Court has decided an important question of federal law which has not been, but should be settled by this Court. Respondent submits that the only questions of law decided by the Circuit Court are (a) that it, in the condition of the record and in the face of the stipulation, could not go behind the findings of fact made by the District Court, (b) that it could not say as a matter of law that the extent to which the shareholders were permitted to participate was too great or that the compromise by present shareholders of their rights was not of substantial value to

those holding the bonds, (c) that the provisions of Subdivision (b)(5) of Section 77B have no relevancy to this case, since they are applicable only where the holders of less than two-thirds in amount of a given class of creditors have accepted the plan, and in this case the holders of more than two-thirds in amount of the bonds have consented to the plan, (d) that Section 77B clearly empowers the Court to approve a proposal altering the rights of secured creditors either through the issuance of new securities of any character, or otherwise, and that a plan substituting preferred stock for secured bonds is within the purview of the Act, and (e) that if (as in the case at bar) the proposal is found to be fair and feasible and not discriminatory in favor of any class, the consent of two-thirds of a class is binding on the minority, notwithstanding their rights are materially altered. The conclusions of the Circuit Court on these elementary principles of interpretation of Section 77B are all in accord, not only with all of the decisions of this Court, but also with all of the decisions of the various Circuit Courts and District Courts which have been handed down and are available in the published reports since the enactment of Section 77B.

Petitioners have argued in their brief that the plan proposed by respondent and confirmed by the District Court in this case is a solitary and unheard-of example of corporate reorganization and is a victory which utterly destroys the bondholder. Petitioners are concerned that this case, if allowed to stand, will be a precedent for the transmutation of a mortgage lien into cheap capital stock

and that such action will drive thousands of men and women of ordinary means to want and starvation. Respondent submits that it is clearly contemplated by Section 77B, and all of the decisions so hold, that dissenting secured creditors may be forced to take shares of stock to evidence their proportionate interest in a reorganized corporation provided (1) the holders of two-thirds in amount of the secured claims in the class consent to such "transmutation" and (2) the Court finds the plan to be fair, equitable, feasible and non-discriminatory. As pointed out in the able decision of the District Court [R. pp. 202-245] such a statutory provision is constitutional and when the constitutional question is properly presented to this Court, respondent submits, as did the District Court, that this Court will so hold. Petitioners argued the constitutionality vigorously before the District Court, but expressly did not question the constitutionality in their appeal to the Circuit Court [R. p. 380] and have not raised any constitutional question in their petition to this Court, although in their brief (Br. p. 71) they urge that the order confirming the plan violates their constitutional rights and also violates the provisions of Section 77B of the Bankruptcy Act in that the Plan is unfair, inequitable and does not afford the "adequate protection" required by that section. We will not lengthen this brief by a duplication of a citation of authorities and a discussion on this subject, which has been well covered by the District Court in its decision [R. pp. 202-245].

II.

Respondent's Answers to Petitioners' Arguments.

Petitioners have set forth in their brief extended arguments which attack the conclusions of the District Court on the merits of the plan in this case. Although respondent is of the opinion that the petition should be denied for the reasons set forth above and that the arguments of petitioners on the merits are not appropriate in this proceeding, nevertheless respondent will briefly answer said arguments (in the order presented by petitioners); so that respondent's views will be clear to this Court if it desires to consider them.

(1) Answer to Petitioners' Point I.

The District Court, based upon a careful consideration of all of the facts and the plan, found that the plan was fair, equitable, feasible, not discriminatory, and confirmed the same [R. pp. 306, 328 and 340]. The Circuit Court affirmed the District Court's decision, stating that in the state of the record and in the light of the stipulation hereinbefore referred to, it was not possible for it (the Circuit Court) to do other than accept these findings [R. pp. 376-377].

Petitioners argue:

> "This Plan Takes Away From Petitioners Their Vested Rights in the Properties Mortgaged by Debtor to Secure Payment of the Bonds, Without Payment in Full, Without Payment of Any Due and Unpaid Interest on the Bonds and, Only for 'the Principal

Amount of the Bonds', Offers Preferred Stock in a New Corporation on an Unfair and Inadequate Basis." (Br. p. 23.)

Subdivision (e)(1) of Section 77B provides

"a plan of reorganization shall not be confirmed until it has been accepted in writing * * * by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan * * *."

This section, together with other provisions of Section 77B, as interpreted by court decisions, gives authority for the scaling down of a secured debt by way of reduction of interest, reduction of principal, extension of maturity date, or the substitution of shares of stock for securities evidencing a secured debt, provided two-thirds in amount of the class have consented, and provided further that the plan is determined by the District Court to be fair, equitable, feasible and not discriminatory as to any member of the particular class. Here it is admitted that the plan submitted has been consented to by the holders of over 90% in principal amount of respondent's bonds [R. pp. 210, 327]. The District Court has found the plan to be fair, equitable, feasible and not discriminatory [R. pp. 306, 328, 340]. Petitioners, by their stipulation, are bound not to attack these findings of fact and the proceedings of the District Court [R. p. 285; Br. p. 75]. The Circuit Court affirmed the District Court's decision, stating that, in the state of the record and in the light of the stipulation, it was not possible for it (the

Circuit Court) to do other than accept these findings [R. pp. 376-377].

The cases cited by petitioners in support of their argument can be readily distinguished. In *Louisville Joint Stock Company v. Radford,* 290 U. S. 555, the Supreme Court did make the statement quoted, but a reading of the case indicates that it has no bearing upon and is not analogous to the case at bar. It arose under the first Frazier-Lemke Act, which is Section 75s of the Bankruptcy Act. It dealt with a single mortgagee and not with a group or class of secured creditors. For further discussion we respectfully refer the Court to that portion of the District Court's learned opinion in this case wherein the *Radford* case is discussed [R. pp. 213-214].

In *Security-First National Bank v. Rindge Land Company,* 85 Fed. (2d) 557, the Circuit Court of Appeals for the Ninth Circuit held as indicated by petitioners in their brief, but this case is not authority for the proposition submitted by petitioners. In the *Rindge* case the plan of reorganization contemplated the sale of property subject to the lien of the bonds for sufficient to pay the bondholders 40¢ on the dollar. The bondholders in question owned 98% in principal amount of the oustanding bonds and *refused to consent to the plan.* The only issue before the Circuit Court was whether one who had purchased bonds at 40¢ on the dollar of their face value could be forced, under a reorganization proceeding under Section 77B instituted by the obligor on the bonds, to accept in full settlement 40¢ on the dollar, which was the amount which said purchaser had paid for the bonds. The Court

disapproved the plan. The case is not in any way analogous to the case at bar for the reasons set forth.

In the case of *In re Day & Meyer, Murray & Young*, 93 Fed. (2d) 657, 35 A. B. R. N. S. 440 (C. C. A. 2, 1938), cited by petitioners, the appealing bondholders owned a small portion of the outstanding first mortgage bonds. The total amount of such bonds outstanding was $590,500 and, in addition, unpaid interest in an approximate amount of $173,000. All of the assets, with the exception of certain current assets in cash, were subject to the mortgage which secured the bonds and the value of the mortgaged assets exceeded the principal of the bonds. Under the plan of reorganization before the Court the first mortgage bonds would have been reduced to 50% of their principal amount. The equity thereby created was to have been represented by new preferred stock (which was to be shared dollar for dollar by the bondholders with the general creditors) and new common stock which was to be shared by bondholders with the preferred stockholders and general creditors. The old common stockholders were to be eliminated entirely. The Court found that the company was insolvent and that there was no justification for reducing the bonds to one-half the principal amount and for eliminating the total of unpaid interest, and thus giving that equity to the old general creditors and stockholders, where no new consideration was given by the stockholders. This appears from the following quotation from page 659 of the decision in said case as reported in 93 Fed. (2d) 657:

> "The total liabilities of the corporation exceed the assets by $84,000. There is therefore no equity for either the preferred or common stock and, *without contributing a new consideration*, the preferred stockholders should not receive new common stock share

for share. This is the same class of preferred stock which goes to the first mortgage bondholders for their substantial interest claim." (Italics ours.)

In re Day & Meyer, Murray & Young, 93 Fed. (2d) 657 at 659.

In the case at bar the District Court found [R. pp. 321-323] that the present shareholders were properly permitted to participate in the plan and receive shares of stock in the reorganized company because (1) the value to the bondholders of maintaining the debtor as a going concern and of avoiding litigation is in excess of the value of the stock being issued to the present shareholders and (2) valuable consideration is given for such participation in the virtual abrogation of the 1930 amendment deferring foreclosure until 1944 and (3) the continued participation of the present shareholders in the reorganized company will be an asset of value to it because of the familiarity of these stockholders with the business of the reorganized company and because of their financial standing and influence in the community.

Respondent does not deem it helpful or necessary to discuss the *Continental Illinois National Bank v. Chicago Rock Island*, 294 U. S. 648, and *Northern Pacific Railway Company v. Boyd*, 228 U. S. 482, cases cited by petitioners, as they clearly have no bearing on the case at bar.

In re Tennessee Publishing Company, 299 U. S. 18, has been cited at several points in petitioners' brief, and we will not lengthen this brief by a discussion of that case and its disposition in the courts, as it does not support petitioners' contention. We would, however, respectfully call the attention of this Court to such a discussion, which appears in the decision of the District Court in this case [R. pp. 211-212].

(2) Answer to Petitioners' Point II.

At pages 27 to 32, both inclusive, of their brief petitioners cite a large number of cases to the effect that where a corporation is insolvent there remains no equity in which the stockholders may claim a participation. We have no quarrel with the cases cited and, hence, refrain from discussing them.

A complete answer to petitioners' criticism of allowing the present shareholders to participate in the Plan in the case at bar lies in the fact that such participation is not based upon any so-called equity, but upon the fact that said present shareholders are contributing a valuable new and additional consideration to the reorganized company.

The District Court found, after a careful consideration of all of the evidence and the plan, that the value to the bondholders of maintaining the debtor (respondent herein) as a going concern and of avoiding litigation was in excess of the value of the stock of the reorganized company being issued to the present shareholders of respondent under said plan [R. p. 323]; that the principal valuable consideration passing between the bondholders and the present shareholders to justify their participation in the plan is the virtual abrogation of the 1930 amendment deferring foreclosure of the bonds until 1944 [R. pp. 321-322]; that the continued participation of the present shareholders in the reorganized company as shareholders would be an asset of value to it and its other shareholders (the old bondholders) because of the familiarity of the present shareholders with the business and because of their financial standing and influence in the community [R. p. 321]; that the reorganization places the bondholders in a position where they, as shareholders, may exercise control of the reorganized company [R. p. 233],

whereas if it were not for the reorganization, the present shareholders would retain control until the maturity of said bonds in 1944 [R. pp. 220-230, 320]. The Circuit Court held that the findings of the District Court and the said stipulation foreclosed any inquiry by the Circuit Court on these points and that the Circuit Court could not find, as a matter of law, that the extent to which the present shareholders were permitted to participate was too great or that a compromise of their rights was not of substantial value to those holding the bonds [R. p. 378].

Inasmuch as none of the decisions cited by petitioners in any way conflicts with the foregoing rule, and since the able opinion of the District Court discloses ample authority in support of the same [R. pp. 225-228], respondent believes that it is unnecessary to further lengthen this brief by the citation or discussion of such authorities.

(3) Answer to Petitioners' Point III.

The District Court [R. p. 231] decided, as did the Circuit Court [R. pp. 378 and 379], that the provisions of subdivision (b)(5) of Section 77B were not applicable, since that subdivision covers only cases where less than two-thirds in amount of a given class have accepted the plan. Here the holders of more than two-thirds in amount of the bonds approved the plan [R. p. 327].

Petitioners state (Br. p. 33) that the first part of their point, to-wit, that the plan is not fair because no compensation is provided for dissenting bondholders for the loss of their mortgage lien, seems to have escaped determination by the Circuit Court. The Circuit Court [R. pp. 379 and 380] clearly held that a plan substituting preferred stock for secured bonds is within the purview of

Section 77B of the Bankruptcy Act and that if the proposal is found to be fair, feasible and not discriminatory in favor of any class, the consent of two-thirds of a class is binding on the minority, notwithstanding the fact that their rights are materially altered.

Petitioners also state (Br., p. 33) that the Circuit Court decided that the plan did afford "adequate protection" as contemplated in subdivision (b)(5) of Section 77B of the Bankruptcy Act. We respectfully call this Court's attention to the decision of the Circuit Court [R. pp. 378 and 379] where the Circuit Court held that the provisions of subdivision (b)(5), just referred to, have no relevancy to the case at bar since they are applicable only where less than two-thirds in amount of a given class have accepted a plan and that in this case the holders of more than two-thirds in amount of the bonds have approved the plan. Respondents believe that none of the cases cited in petitioners' argument on this point has any bearing on this case in the light of the fact that the holders of more than two-thirds in amount of the bonds consented to the plan and the plan was found to be fair, feasible and not discriminatory.

(4) Answer to Petitioners' Point IV.

The District Court [R. pp. 218-220] and the Circuit Court [R. pp. 379 and 380] held that Section 77B clearly empowers the Court to approve a plan consented to by the holders of the requisite percentage in amount of secured bonds and substituting preferred stock for secured bonds if the proposal is found to be fair and feasible and not discriminatory in favor of any class, and that such plan and consent is binding on the non-consenting minority

bondholders, notwithstanding the fact that their rights are materially altered under such a plan.

The cases cited by petitioners simply hold that where a plan is found by the Court to be unfair, not feasible or discriminatory the same cannot be sustained even if a large majority of the creditors has approved the plan. This rule clearly has no applicability to the case at bar, for the reason that the District Court found the plan to be fair, equitable, feasible and not discriminatory. [R. pp. 306, 328 and 340.] Petitioners, by their stipulation, are bound by this finding and the cases cited, therefore, have no bearing on the case at bar.

(5) Answer to Petitioners' Point V.

Under this point petitioners argue that respondent in formulating the plan has excluded interest unpaid on the bonds. (Op. Br. p. 44.) Under the plan approximately 77% of the shares of stock of the reorganized company go to the bondholders and 23% to the present shareholders. This basis of distribution was arrived at by agreement in connection with the formulation of the plan and was approved by the District Court. The face value of the bonds outstanding is used merely as a basis for computing the number of shares of stock to go to each bondholder and it makes no difference that the interest unpaid on the bonds was excluded in this arithmetical computation. The 250 shares to which each bondholder is entitled because of his ownership of $1,000 principal amount of bonds would be exactly the same if the basis of computation used in making the distribution among the bondholders was the total of principal and unpaid interest on each bond.

(6) Answer to Petitioners' Point VI.

In answering petitioners' argument made under this point, respondent can do nothing more than call this Court's attention to the finding of the District Court that the plan is fair, equitable, feasible and not discriminatory. [R. pp. 232-233, 306, 328, 340.] By the stipulation [R. pp. 285-287] petitioners agreed that they would not attack any findings of the District Court on the ground that they are unsupported by the evidence.

Under the plan, petitioners, as bondholders, are treated the same as all other bondholders. Petitioners apparently believe they should have been in some way preferred over other bondholders. Such a disposition of dissenting bondholders in itself would create a discrimination. The District Court [R. pp. 242-243] very aptly described the position of petitioners in this proceeding as follows:

> "The court is familiar with the usual proposals in these cases—to pay off in full the non-assenting, or at least the objecting, bondholders and get rid of them. It does not approve of any such proposal. It sees no reason why any portion of the money available for bondholders should be diverted to pay off any particular bondholders. Every one here will, I believe, agree with that principle. It is, of course, true that a court of equity will not allow minority bondholders to be disregarded, or unfairly treated in a reorganization plan, yet, on the other hand, it will not lend its aid to a claim by a minority bondholder which may result in holding up a fair reorganization plan, solely as a means of obtaining greater value or more favorable returns for that minority bondholder than are offered to all the other bondholders.

"I want it definitely understood that this court does not believe that Mr. Case and the other objector are in here with the deliberate idea of holding up this proceeding, in order to shake down the rest of you, and compel you to pay them off. In fact, I would state, from my knowledge of men, that this is not the case. However, it is unfortunate that the effect is just exactly the same as though they were doing that very thing. That is, the legal effect of it is exactly the same, and this court believes that it was to avoid just such abuses that Section 77-B was placed on the statute books by Congress." [R. pp. 242-243.]

(7) Answer to Petitioners' Point VII.

Petitioners urge an estoppel. This argument was completely answered by the District Court in its decision. [R. pp. 234-235.] We adopt the position taken by the District Court as a complete answer but if this Court is interested, its attention is respectfully called to that portion of the record referred to above and to the cases cited. To hold that respondent is estopped by the covenant of the trust indenture referred to by petitioners would be to enforce a contract not to take advantage of the provisions of the bankruptcy law. Such contracts have been universally held unenforceable. Furthermore the District Court had authority to, and did properly, disregard this provision of the trust indenture under the provisions of subdivision (b)(10) of Section 77B, which provides:

"* * * the judge shall scrutinize and may disregard any limitations or provisions of any depositary agreements, trust indentures, committee or other authorizations affecting any creditor under this section * * *."

III.

Conclusion.

Respondent respectfully submits that for all of the foregoing reasons the petition for writ of certiorari should be denied.

FARIES AND MCDOWELL,
DAVID R. FARIES,

J. CLIFFORD ARGUE,
Of Counsel.

GIBSON, DUNN AND CRUTCHER,
J. C. MACFARLAND,
STUART L. LAPP,
WOODWARD M. TAYLOR,
Attorneys for Respondent.

FREDERIC H. STURDY,
Of Counsel.

APPENDIX.

Statement of Facts.

Respondent is a holding corporation owning and holding all of the capital stock, except qualifying shares, of six subsidiary corporations. Three of these subsidiaries are without assets and are ready for dissolution. Of the other three corporations, two have assets of little value which are to be sold as soon as possible, the proceeds therefrom to be divided among the bondholders and a dissolution of the corporations effected. The only subsidiary having substantial assets is Los Angeles Shipbuilding & Drydock Corporation (hereinafter referred to as "Shipbuilding Company") [R. pp. 67-69, 313-315]. This subsidiary is engaged in building and repairing ships in its shipyards located on approximately 68 acres of tidelands leased from the City of Los Angeles at Los Angeles Harbor. Its main assets consist of a ship repair and shipbuilding plant and cash on hand. Its present operating activities consist chiefly in the repairing of merchant vessels, although it was originally organized during the World War to carry on an extensive program of ship construction. During its busiest years the corporation employed several thousand men each day and did a gross volume of business running into many millions of dollars [R. pp. 70-74, 313-315]. In 1924 respondent issued and sold approximately three and one-half million dollars principal amount of its First Lien and Collateral Trust 20 Year 7½% Sinking Fund Gold Bonds. This bond issue was secured by a pledge under a mortgage

or trust indenture of all the shares of capital stock, except directors' qualifying shares, of all of respondent's subsidiary corporations, which mortgage or trust indenture also covered respondent's fixed assets and the fixed assets belonging to respondent's subsidiary corporations. There are presently outstanding of this bond issue $2,565,500 face value of bonds upon which no interest has been paid since February 1, 1929 [R. pp. 204, 319, 326].

In 1930 respondent became financially embarrassed and a voluntary reorganization was effected through the medium of a Bondholders' Protective Committee. Under the arrangement consummated at that time holders of 97% of the outstanding bonds filed their written consents with the Bondholders' Protective Committee authorizing and directing the execution of a supplemental and amended trust indenture. The original trust indenture, above referred to as a mortgage or trust indenture, securing the payment of said bonds, and particularly Section 11, Article IX thereof, provided that the bonds and the trust indenture might be amended by a supplemental indenture executed by respondent, its principal subsidiary, the Los Angeles Shipbuilding & Drydock Corporation, and the trustees under said indenture, with the consent of the owners or holders of at least 75% in principal amount of the bonds outstanding or with the consent of the bond underwriters and the owners and holders of at least a majority in principal amount of the bonds outstanding provided, however, that no amendment of the bonds or trust indenture could be made which might create any discrimination among or

between outstanding bonds. Acting pursuant to the consents of the holders of 97% in principal amount of the outstanding bonds and the power so given in the trust indenture, a supplemental and amended trust indenture was duly executed, by the terms of which, among other things, the interest rate of the bonds was reduced from 7½% to 6% and the right to foreclose under the trust indenture for failure to pay interest unless the same was earned was waived until 1944, the maturity date of the bonds [R. pp. 204-205; 321].

Under this arrangement consenting bondholders waived any right to enforce the statutory California stockholders' liability against the stockholders holding a large proportion of the outstanding capital stock, which stockholders, in consideration of the amendments to the trust indenture, and as a part of the arrangement contributed $400,000 cash to the capital of respondent. The bondholders who consented to this arrangement deposited their bonds with a trustee under a Declaration of Trust and received certificates of deposit therefor. The articles of incorporation of respondent were also amended to provide for Class A and Class B shares without par value which were issued in conformity with the terms of the permit from the Division of Corporations of the State of California [R. pp. 204-205; 320].

There are now outstanding 57,788 shares of Class A stock and 5,112 shares of Class B stock of respondent [R. pp. 205 and 319].

In 1937 another voluntary reorganization was attempted under a plan which the Division of Corporations of the State of California, after public hearing, deemed to be fair and equitable. It was proposed that this 1937 plan be consummated by one of two methods, either (1) by consent of the parties, or (2) a Bankruptcy Act Section 77B proceeding; and that the method to be followed would be determined by the Board of Directors of respondent. The second method was finally adopted by the Board owing to its inability to obtain sufficient consents without court action to the first method [R. pp. 80, 313-315]. Financial difficulties had arisen largely because respondent and its principal subsidiary, the Shipbuilding Company, were unable to secure credit, due to respondent's top heavy bond issue, nor were they able because of the prior lien of the bond issue to secure faithful performance bonds from the surety companies, which were essential to the undertaking of any shipbuilding contracts. All of the fixed assets of the Shipbuilding Company were appraised by the American Appraisal Company at $465,000. These assets were directly subject to the bond issue. The other assets of the Shipbuilding Company, including cash, accounts receivable, inventory, supplies, etc., in 1937 were estimated at approximately $365,203.03. These last mentioned assets were not directly subject to the lien of the trust indenture securing respondent's bonds, but the capital stock of the Shipbuilding Company, as well as that of the other subsidiary companies, was held by the trustee as hereinbefore indicated as additional security for the bonds. The result of the appraisal showed that the assets of respondent and its principal subsidiary had a value of approximately $830,000 [R. pp. 80, 205-206, 313-316].

In connection in January, 1938, with the filing of the petition by respondent as debtor in the proceeding entitled, "In the Matter of Los Angeles Lumber Products Company, Ltd., a corporation, Debtor, in proceedings for the reorganization of a corporation," in the District Court of the United States for the Southern District of California, Central Division, Cause No. 31352 RJ on the docket of said court, respondent herein proposed a plan of reorganization which was similar in all respects to that theretofore approved in 1937 by the Division of Corporations of the State of California. The plan, briefly stated, contemplated the formation of a new corporation to be known as Los Angeles Shipbuilding & Drydock Corporation, which corporation was to acquire, free and clear of liens, the assets of respondent and its principal subsidiary, the Shipbuilding Company, except the capital stock of Masset Timber Company, Ltd., and Puget Sound Lumber & Box Company, two of respondent's subsidiaries which were to be liquidated and the proceeds derived from liquidation distributed pro rata among the bondholders as stated above. The new corporation was, according to the plan, to have an authorized stock of 1,000,000 shares of the par value of $1.00 per share, 830,000 shares were to be presently issued as follows: 590,065 shares to the holders of outstanding bonds pro rata on the basis of 230 shares for each $1000 bond and 239,935 shares to the holders of the Class A stock of respondent who had in 1930 contributed $400,000, as stated above, and who were largely responsible for the management of respondent. The balance of the authorized capital stock, 170,000 shares, was to be retained in the treasury for future sale in the event additional working capital was needed. Thereupon respondent and

all remaining subsidiaries were to be liquidated and dissolved. By the terms of the proposed Plan of Reorganization the capital stock of the new corporation was made non-assessable and the Board of Directors was to continue as theretofore until the new stockholders elected their successors. All creditors of respondent, other than bondholders and respondent's subsidiaries, and all expenses of administration were to be paid in cash. Under the proposed plan bondholders were to receive approximately 71% of the capital stock of the new corporation and the said Class A shareholders of the respondent were to receive approximately 29% thereof. Class B stockholders, practically all of whom were also bondholders, were to receive nothing. The original plan was duly accepted by the holders of over 90% in principal amount of the outstanding bonds, over 99% in amount of outstanding Class A stock and over 89% in amount of Class B stock [R. pp. 18-41, 206-207].

During the hearings before the Special Master herein the Plan of Reorganization as originally proposed was amended so that bondholders are now to receive approximately 77% of the capital stock of the new corporation presently to be issued instead of 71% as originally planned and so that the old Class A stockholders will receive 23% instead of 29%, and the capital stock of the new corporation is to be divided into preferred and common stock, all shares of both classes having equal voting rights per share, but the preferred stock having preference upon liquidation to the extent of the par value thereof over the common stock, and having preference as to non-cumulative dividends in any year to a payment up to 5% before any amount shall be paid on common stock. Thereafter dividends to be paid on the same basis to both preferred and

common stock. Under this amended plan the shares of stock to be issued to bondholders are all to be preferred stock. 830,000 shares of the authorized capital of 1,000,000 shares at $1.00 par value are to be issued as follows: 641,375 shares of preferred stock to bondholders pro rata on the basis of 250 shares for each $1,000 bond and 188,625 shares of common stock to the holders of Class A stock of the debtor corporation. The balance of the authorized capital shares amounting to 170,000 shares of preferred stock will be retained in the treasury for future sale in the event additional working capital is needed [R. pp. 58-62, 209-210]. The amended plan has been properly approved in writing by the owners and holders of 92.81% face value of respondent's outstanding bonds; 99.75% of respondent's Class A capital stock; and 90% of respondent's outstanding Class B capital stock [R. pp. 210 and 327; N. B.: The discrepancy between the final order, R. p. 327, and the opinion of the District Court, R. p. 210, is due to the fact that adidtional consents came in after the execution of the final order and prior to the rendition of the opinion].

No objection has been made to the approval of the plan by any stockholders or creditors of respondent, except petitioners herein, who are the owners and holders of $18,500 face value of respondent's outstanding bonds [R. p. 210].